

No. 10,969

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

RALPH SWIHART,

Appellant,

VS.

JAMES A. JOHNSTON, Warden, United States
Penitentiary, Alcatraz, California,

Appellee.

BRIEF FOR APPELLEE.

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Subject Index

	Page
Jurisdictional Statement	1
Facts of the Case	2
Question	4
Contention of Appellee	4
Argument	4
Conclusion	6

Table of Authorities Cited

Cases	Page
Lovvorn v. Johnston (CCA-9), 118 F. (2d) 704.....	5
Mothershead v. King, 37 Fed. Supp. 210.....	3
Salinger v. Loisel, 265 U. S. 244.....	5
U. S. ex rel. Bergdoll v. Drum (Cir. 2), 107 Fed. (2d) 897	4
Walker v. Johnston, 312 U. S. 275.....	4
Statutes	
Title 28 U.S.C.A., Sections 451, 452 and 453.....	1
Title 28 U.S.C.A., Sections 463 and 225.....	1

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JURISDICTIONAL STATEMENT.

This is an appeal from an order of the United States District Court for the Northern District of California denying appellant's petition for writ of habeas corpus. (T. 30.) The District Court had jurisdiction of the habeas corpus proceedings under Title 28 U.S.C.A., Sections 451, 452 and 453. Jurisdiction to review the District Court's order denying the petition is conferred upon this Court by Title 28 U.S.C.A., Sections 463 and 225.

FACTS OF THE CASE.

The appellant, an inmate of the United States Penitentiary at Alcatraz, California, filed a petition for writ of habeas corpus in the Court below (T. pp. 2-16), in which he alleged in substance that his imprisonment by appellee was illegal because the trial Court deprived him of the right of trial by jury. The Court below issued an order to show cause (T. 17) and the appellee filed a motion to dismiss the petition on the ground that the said petition, when considered in conjunction with the record in the prior petition, in case number 23016-R (decided adversely to the appellant—see memorandum opinion of Judge Michael J. Roche, T. pp. 41-46) was insufficient to justify the issuance of a writ of habeas corpus. (T. pp. 17-18.) Appellant thereupon filed a memorandum in opposition to appellee's motion to dismiss petition for writ of habeas corpus. (T. pp. 19-30.) Thereafter the Court below filed the following order denying petition for writ of habeas corpus:

“ORDER DENYING PETITION FOR WRIT OF HABEAS CORPUS AND DISMISS- ING PETITION.

The verified petition for writ of habeas corpus filed herein on August 23, 1944, in substance alleges that petitioner is unlawfully deprived of his liberty by respondent because his conviction in the United States District Court of the Eastern District of Oklahoma for violation of 18 U.S.C.A. 409 was contra to the Fifth Amendment of the Constitution in that despite his demand for jury

trial, he was denied the same and was tried and convicted by the Judge of the Court.

Ordinarily such an allegation would present a factual issue requiring the issuance of the writ and a hearing thereon.

The court issued an order directed to respondent requiring him to show cause why the writ should not issue. Respondent, in response, moved to dismiss the petition, alleging that on December 16, 1943, petitioner filed a verified petition for writ of habeas corpus herein (23016-R) wherein he asserted among many other matters, that he waived a jury trial in the Oklahoma case, in reliance upon an alleged promise, that if he were found guilty by the court, probation would be granted him. Upon hearing before Judge Roche in case #23016, petitioner abandoned the foregoing contention and introduced no evidence in support thereof. Judge Roche made written findings to such effect and dismissed the petition.

Thus petitioner under oath, has alleged in one petition that he waived a jury and in another petition that he was refused a jury despite his demand therefor. The writ of habeas corpus cannot be availed of to serve the purposes of a petitioner who has so little regard for the truth.

While the doctrine of *res adjudicata* does not apply in habeas corpus proceedings, nevertheless the court may deny the petition in reliance upon a prior refusal to issue a writ to the same applicant. *Salinger v. Loisel*, 265 U. S. 224. *Mothershead v. King*, 37 Fed. Suppl. 210. Furthermore the issue raised herein could have been disposed of in case

#23016-R, but was abandoned, U. S. ex rel. Bergdoll v. Drum (Cir. 2), 107 Fed. (2d) 897.

The petition for writ of habeas corpus is denied and the petition is dismissed.

Dated, October 3, 1944.

Louis E. Goodman,

United States District Judge.

Filed Oct. 3, 1944."

(T. pp. 30-32.)

QUESTION.

Was the Court below under an obligation to produce the body of appellant before it to determine if he was entitled to a discharge?

CONTENTION OF APPELLEE.

The answer to the above stated question is "No".

ARGUMENT.

On the record before it the Court below was under no obligation to issue the writ and properly decided the merits of appellant's petition on order to show cause.

The Supreme Court of the United States in the case of

Walker v. Johnston, 312 U. S. 275,

approved the practice of issuing the order to show cause to determine whether issues of fact emerging from the pleadings warranted a hearing on habeas corpus, as provided in the habeas corpus statutes. See also

Lovvorn v. Johnston (CCA-9), 118 F. (2d) 704.

In

Salinger v. Loisel, 265 U. S. 244,

it was held by the Supreme Court that a prior refusal to discharge on a like application may be considered, and even given, controlling weight. Here the Court below properly refused the appellant the relief sought on the ground that the issue which he raised in the instant petition, to-wit, deprivation of trial by jury, was the same issue he raised in his petition before his Honor Judge Roche. Appellant denies in his opening brief that he raised the issue of his alleged deprivation of trial by jury before Judge Roche. A reading of the opinion of Judge Roche, above referred to, conclusively shows otherwise.

To summarize, appellee believes that the opinion of the Court below adequately and aptly expresses any arguments he might advance, and accordingly in reliance on this opinion, the reasoning therein, and the authorities cited, he rests his case.

CONCLUSION.

In view of the foregoing, it is respectfully submitted that the order of the Court below denying petition for writ of habeas corpus is correct and should be affirmed.

Dated, San Francisco, California,

May 14, 1945.

FRANK J. HENNESSY,

United States Attorney,

JOSEPH KARESH,

Assistant United States Attorney,

Attorneys for Appellee.